NO. 56285-5

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, GOVERNOR JAY INSLEE, in his official capacity, ATTORNEY GENERAL BOB FERGUSON, in his official capacity, and BOARD OF REGISTRATION FOR PROFESSIONAL ENGINEERS & LAND SURVEYORS, an agency of the State of Washington,

Appellants,

v.

FISHERIES ENGINEERS, INC., a Washington corporation, PAUL TAPPEL, an individual and professional engineer,

Respondents.

APPELLANTS' RESPONSE TO BRIEF OF AMICI CURIAE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

I. INTRODUCTION

The Brief of Amici Curiae offers little valuable context to assist with analyzing Washington's Professional Engineers' Registration Act (Engineering Act). It relies on old cases that pre-date any licensing requirements for or regulation of the engineering profession. It describes infrastructure accidents and tragedies, but does not claim that they were caused by unqualified individuals engaging in the practice of engineering, or that the public was misled into hiring incompetent engineers for these projects because of the use of "engineer" in job titles. And it suggests that thousands of Washington workers are currently violating the Engineering Act merely by having the word "engineer" in their occupational titles, despite the fact that the work they do is lawful.

Amici's advocacy for the protection of the title "engineer" is not grounded in the language of Washington's statutes. Rather, it appears motivated by professional protectionism, as amici effectively seek a monopoly on the public use of the word

"engineer." The Court should reject the overbroad reading of the practice and title laws in the Engineering Act and reverse the superior court's order.

II. ARGUMENT

Amici seek to turn Washington's Engineering Act on its head, converting regulations intended to shield the public from incompetent engineers into tools of economic protectionism. Like Tappel, amici tacitly acknowledge that they have no objection to the actual *work* of the people whose titles they object to. And, like Tappel's, amici's position is both contrary to Washington law, and has consistently been found to be unconstitutional by courts across the country, as explained in Appellants' briefs.

A. Prohibiting the Word "Engineer" in Job Titles Protects the Profession, Not the Public

As amicus National Society of Professional Engineers (NSPE) explains on its own website, there is a difference

between "professional engineers" and "engineers."[1] As they point out, a professional engineer can "take on a higher level of responsibility" than another, unregistered engineer. And, "PEs shoulder the responsibility for not only their work, but also for the lives affected by that work,"[2] and under Washington law, for the work of the engineers that they supervise. RCW 18.43.130(4).

It is true, as amici note, that the adoption of modern professional engineering licensing requirements and regulations has followed tragic engineering failures. *See* Paul M. Spinden, *The Enigma of Engineering's Industrial Exemption to Licensure: The Exception that Swallowed a Profession*, 83 UMKC L. REV. 637, 662-63 (2015); Br. of Amici Curiae 8-10. That is why the Washington legislature created the Engineering Act, and

[1] *What is a PE?*, NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS, https://www.nspe.org/resources/licensure/what-pe (last visited July 29. 2022).

[2] *Id.*

empowered the Board to enforce it to protect the public from the unlicensed, unregulated practice of engineering.

But it is also true that the primary advocate for such laws that regulate entry to the engineering profession—including for laws that dictate who can even call themselves "engineers"—has been amicus NSPE itself. *Id.* "The licensing or registration of engineers in the United States and its jurisdictions has been a key goal of NSPE since its founding in 1934."[3] In fact, NSPE and, by virtue of its relationship to NSPE, amicus Washington Society of Professional Engineers, formally take the position that the title "engineer" should be used only by "qualified individuals," as defined by NSPE.[4] They also advocate for the elimination of

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[3]Committee on Policy and Advocacy, *NSPE Position Statement No. 09-1737—Licensure & Qualifications for Practice,* NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS (rev. July 2018), https://www.nspe.org/resources/issues-and-advocacy/professional-policies-and-position-statements/licensure-and

[4]Committee on Policy and Advocacy, *NSPE Position Statement No. 10-58 Employment Practices – Use of Engineering Titles*, NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS (rev. Nov. 2019) https://www.nspe.org/resources/iss

exemptions from licensure in state laws.[5] So it is not surprising that here they support the broadest possible reading of Washington's licensure statutes, which would prohibit anyone who is not licensed by the Board of Registration for Professional Engineers and Land Surveyors from using the word "engineer" in their job titles.

"[N]o profession is more fiercely protective of its job title than engineering." Eric Dexheimer, *Their Name on the Line, Texas Engineering Regulators Head to Court*, AUSTIN AMERICAN STATESMAN (Sept. 3, 2016), https://www.statesman.com/story/news/2016/09/03/their-name-on-the-line-texas-engineering-regulators-head-to-court/10150469007/. This professional protectionism is evident in amici's briefing. Like Tappel, they

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ues-and-advocacy/professional-policies-and-position-statements/employment-practices-use (sunset date Sept. 2020).

[5]Committee on Policy and Advocacy, *NSPE Position Statement No. 09-173—Licensure Exemptions*, NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS (rev. Mar. 2019), https://www.nspe.org/resources/issues-and-advocacy/professional-policies-and-position-statements/licensure-exemptions (sunset date Mar. 2020).

complain that "over 800 employees at multiple state agencies [have] professional engineering job titles." Br. of Amici Curiae 6. Yet they do not argue that these employees must cease performing engineering work because they are not licensed—which is what one would argue if truly concerned with the public's safety. *Id.* Rather, they argue only that the employees must stop using the word "engineer" in their job titles. *Id.*

To support this argument, they offer the same misguided reading of the Engineering Act as Tappel. They note the "Legislature expressly equated the titles 'engineer' and 'professional engineer' in its licensing statute." Br. of Amici Curiae 10-11. Therefore, amici contend, anyone who uses the word "engineer" in their job title necessarily conveys to the public they are a licensed "professional engineer." But, as explained extensively in Appellants' Opening and Reply Briefs, this is not so. Just because within chapter 18.43 RCW the word "engineer" means "professional engineer," it does not follow that every person's use of the word "engineer" in their occupational

title necessarily conveys that they are a "professional engineer" as defined by RCW 18.43.020(10). *See* Appellants' Opening Br. 49-55; Appellants' Reply Br. 22-27.

Amici also make the conclusory assertion that "creative 'engineer' job titles confuse professional engineers with unlicensed technicians." Br. of Amici Curiae at 15-16. Yet they cite to *no* evidence of any confusion or harm. They make this argument despite the fact that they themselves acknowledge there is a difference between a "professional engineer" and an "engineer."[6] As NSPE explains, "Only a licensed engineer may prepare, sign and seal, and submit engineering plans and drawings to a public authority for approval, or seal engineering work for public and private events."[7] RCW 18.43.020(8)(a), .070. Neither amici nor Tappel have shown that simply omitting the word "engineer" from the job titles of those who do not

[6] *What is a PE?*, NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS, https://www.nspe.org/resources/licensure/what-pe (last visited July 29. 2022).

[7] *Id.*

perform the work of a "professional engineer" will serve the Engineering Act's goal of protecting the public from incompetent engineers.

Licensing requirements must be determined by state legislatures and the administrative agencies they empower to implement the regulatory schemes. It is not for the professional organizations, lobbying organizations (as amicus American Council of Engineering Companies is), or the courts to substitute their judgment for how best to protect the public from the danger of incompetent engineering services. As discussed at length in Appellants' Opening and Reply Briefs, the text of Washington's Engineering Act does not support that a person using the word "engineer" in their job title must either be licensed by the Board or change their job title. Appellants' Opening Br. 49-55; Appellants Reply Br. 22-27. The Court should reject arguments to the contrary.

B. Washington Cases Do Not Support Amici's Reading of the Engineering Act

Washington cases involving other licensing schemes do not support amici's broad reading of the Engineering Act. *See* Br. of Amici Curiae 23 (relying on *State v. Pac. Health Center, Inc.*, 135 Wn. App. 149, 143 P.3d 618 (2006), and *Wash. State Bar Ass'n v. Great W. Union Fed. Sav. and Loan Ass'n*, 91 Wn.2d 48, 586 P.2d 870 (1978)). *Pacific Health Center* concerned what it means to engage in the practices of medicine, naturopathy, and acupuncture. There, the Court affirmed the violations not because of the job titles the defendants used, but because the defendants *actually engaged in conduct* that required licensure by offering certain services and providing certain treatments they claimed would heal their patients. *Pac. Health Ctr., Inc.,* 135 Wn. App. at 161-70.

Similarly, *Washington State Bar Association* analyzed whether certain conduct—not titles—amounted to the unauthorized practice of law. *Wash. State Bar Ass'n*, 91 Wn.2d

at 49. In considering what counts as the "practice of law," the Court focused on the types of services rendered, such as "doing or performing of services in the courts of justice . . . [providing] legal advice and counsel and the preparation of legal instruments" and the "selection and completion of preprinted form legal documents." *Id.* at 54. It did not focus on the words or job titles the defendants used.

Again, in considering whether someone has violated chapter 18.43 RCW by engaging in the practice of engineering without a license or conveying the authority to practice when unlicensed, the Board looks to whether the unlicensed person is using one of the specifically proscribed titles (professional engineer, structural engineer); is engaged conduct that amounts to the practice of engineering; or whether the person's job title in connection with the services they offer tends to convey the impression that he or she is a licensed professional engineer. CP2 57, 78-80. This is consistent with Washington case law and,

importantly, the language of the Engineering Act itself. RCW 18.43.010, .020(8).

C. Other Jurisdictions Do Not Support Amici's Reading of the Engineering Act

In support of its arguments that "engineer" can be used only by those who are licensed professional engineers, amici rely on cases from other jurisdictions that pre-date the regulation of the engineering profession altogether, that long pre-date the proliferation of occupations with the term "engineer" in their titles, or have nothing to do with engineering. And they ignore the body of case law from across the country that contradicts this position.

For example, *Dent v. West Virginia*, 129 U.S. 114, 9 S. Ct. 231, 32 L. Ed. 623 (1889)—which involved the medical profession, not engineering—merely recognized the authority of states to regulate admission to the practice of professions to protect the public's health and welfare. No party now disputes Washington's authority to regulate admission to the practice of

engineering. And, while the broad principles articulated in *Dent* have been applied by all states in determining the permissible scope of professional regulation for the public's protection, it in no way dictates that the use of the of certain occupational titles must be limited only to those licensed to practice the regulated profession. Indeed, neither amici nor Tappel points to any case that holds that *Dent* compels the prohibition of the use of "engineer," or any other title, by anyone without a state-issued license. Appellants, too, have found none.

Snodgrass v. Immler, 194 A.2d 103 (Md. 1963), and *Rodgers v. Kelley*, 259 A.2d 784 (Vt. 1969), are similarly unavailing. Both involved the use of the term "architect," which has a more "fixed meaning" than the more generic term "engineer." *Jarlstrom v. Alridge*, 366 F. Supp. 3d 1205, 1220 (D. Oregon 2018). More importantly, they were concerned with conduct, rather than the mere use of a title. *Snodgrass* involved a person who actually engaged in architectural planning and design services without a license and then attempted to recover a

fee as a third party beneficiary under a sham contract. *Snodgrass*, 194 A.2d at 106. And in *Rodgers*—which also involved a contract dispute brought by an unlicensed "architect"—the plaintiff "was known as a proficient practitioner of all the architectural arts . . . . He presented himself to the public as one who does the work of an architect." *Rodgers*, 259 A.2d at 785. This is precisely the type of situation the Board would investigate and discipline: when a person engages in the "practice of engineering" as defined by RCW 18.43.020(8)(a), or presents him or herself to the public as one who does the work of a licensed, professional engineer, under RCW 18.43.020(8)(b). The Board's focus is, as it should be, on whether a person's work falls within the scope of practice that requires a license under the Engineering Act, or whether the person conveys the impression, "by verbal claim, sign, advertisement," or otherwise, that they can and do perform work that amounts to the practice of engineering, with the potential for endangering the public. RCW 18.43.020(8)(b).

Finally, while *McWhorter v. State Board of Registration for Professional Engineers and Land Surveyors*, 359 So.2d 769 (Ala. 1978), held that the use of "engineering" in a business's trade name was a per se violation of that state's engineering act, that decision is inconsistent with the weight of authority across the country, *see* Appellants' Opening Br. 60-62, and it pre-dates the proliferation of occupations with the word "engineer" in their titles. Today, "the term 'engineer' has a generic meaning separate from 'professional engineer,' and . . . the term has enjoyed 'widespread usage in job titles in our society to describe positions which require no professional training.'" *Jarlstrom*, 366 F. Supp. 3d at 1220 (quoting *N.C. State Bd. of Registration for Pro. Eng'rs & Land Surveyors v. Int'l Bus. Mach. Corp.*, 230 S.E.2d 552, 556 (1976)). Broadly prohibiting its use, as Tappel and amici request, is not required by Washington's laws, and it would implicate the First Amendment concerns addressed in Appellants' Opening and Reply Briefs. Appellants' Opening Br. 59-65; Appellants' Reply Br. 25-28.

III. CONCLUSION

The State of Washington created the Board of Registration of Professional Engineers so that it could exercise its expertise to protect Washingtonians from incompetent or unlicensed engineers. It does so by prohibiting the use of titles that inherently convey a person is qualified to engage in the "practice of engineering" when they are not. Not every use of the word "engineer" inherently does so. The Court should reject amici's and Tappel's request to substitute their desired interpretation of the Engineering Act to serve their economic interests for the Board's discretion that best protects the public.

I certify that this document contains 2,287 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 1st day of August, 2022.

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I, Leah Harris, certify that I caused to be served a copy of **Appellants' Response to Brief of Amici Curiae** on all parties or their counsel of record on the date below as follows:

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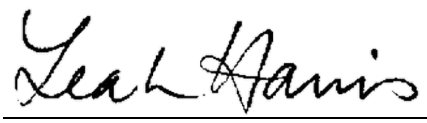

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